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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CONTROLLER OF THE STATE OF CALIFORNIA AND COUNTY TREASURER OF THE COUNTY OF LOS ANGELES,
Petitioners,

v.

ATTORNEY GENERAL OF THE STATE OF TEXAS, et al.,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENT LUMMIS

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QUESTIONS PRESENTED

1. Whether a statutory interpleader action by an estate against the tax officials of two states is an action within this Court's original and exclusive jurisdiction under 28 U.S.C. § 1251(a).

2. Whether the Federal Interpleader Act provides a remedy for an estate which is confronted with mutually inconsistent death tax claims asserted by tax officials from two states.

3. Whether the federal district court, in this interpleader action, can provide a fair and impartial forum.

II

PARTIES

Plaintiffs[1] in the District Court were:

William R. Lummis, Texas Administrator of the Estate of Howard R. Hughes, Jr. (*a citizen of Nevada*)

Defendants[2] in the District Court were:

Kenneth Cory, Controller of the State of California (*a citizen of California*)

H. B. Alvord, County Treasurer for the County of Los Angeles (*a citizen of California*)

and

Mark White, Attorney-General of Texas (*a citizen of Texas*)

Bob Bullock, Comptroller of Public Accounts of Texas (*a citizen of Texas*)

and

The United States of America

Petitioners before the Court are Cory and Alvord. All others are Respondents.

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1. William R. Lummis and Annette Gano Lummis were originally Temporary Co-Administrators in Texas and co-plaintiffs in this action. Annette Gano Lummis subsequently died and her powers vested in William R. Lummis.

2. The other defendant administrators in the District Court were Lummis as the Louisiana Provisional Administrator of the Estate, Delaware Ancillary Administrator of the Estate, and together with First National Bank of Nevada (*a citizen of Nevada*), Nevada Co-Special Administrator of the Estate. Richard Gano (*a citizen of California*) is the California General Administrator of the Estate. The administrators were realigned by the District Court as plaintiffs.

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STATUTES INVOLVED

The statutes involved in this case are 28 U.S.C. § 1251 (a), 28 U.S.C. § 1331, 28 U.S.C. § 1335(a), 28 U.S.C. § 1341, 28 U.S.C. § 1343(a)(3), 28 U.S.C. § 1397, 28 U.S.C. § 1404(a), 42 U.S.C. § 1983, and sections 14104, 14791, 14793-95 of the California Revenue and Taxation Code, and Chapter 634 California Statutes, 1980.

28 U.S.C. § 1251(a) provides:

> "The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States."

28 U.S.C. § 1331(a) provides in pertinent part:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, . . ."

28 U.S.C. § 1335(a) provides in pertinent part:

> "The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, . . . having in his . . . custody or possession money or property of the value of $500 or more, . . . if . . . [t]wo or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property . . . ."

28 U.S.C. § 1341 provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any

tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

28 U.S.C. § 1343(a)(3) provides in pertinent part:

"(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; . . ."

28 U.S.C. § 1397 provides:

"Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside."

28 U.S.C. § 1404(a) provides:

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

42 U.S.C. § 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Con-

stitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The California statutes referred to above are set forth in Appendix I of the Petition for Certiorari (hereinafter "Pet. App.").

STATEMENT OF THE CASE

Respondent William R. Lummis ("Lummis") generally agrees with the Statement of the Case contained in pages 2-6 of the Brief for Petitioners. There is, however, additional background information which may be relevant to the Court's consideration of the issues in this case.

This action is the sequel to the original action, *California v. Texas*, 437 U.S. 601 (1978), and was brought at the suggestion of the four Justices who wrote opinions in connection with the Court's decision in that case. It is a statutory interpleader action brought under 28 U.S.C. § 1335 which requires that there be two or more adverse claimants of diverse citizenship who claim or may claim a right to the money or property constituting the fund.[3] The action seeks a unitary adjudication of the domicile of Howard R. Hughes, Jr. ("Hughes") at the time of his death in order to protect the Hughes Estate ("Estate") against multiple tax claims by, and multiple liability to, the tax officials of California and Texas. The Estate asks for only prospective relief, *i.e.*, declaratory relief as to the domicile of Mr. Hughes at death, and necessary and appropriate injunctive relief.

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3. Jurisdiction is also predicated on 28 U.S.C. § 1331, 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3).

A. The Dilemma Facing The Estate

Lummis alleges, based on an extensive factual investigation, that Mr. Hughes was domiciled in Nevada at death. Nevertheless, this Estate is faced with the very real possibility that the intangible assets of the Estate, which constitute over 99% of its value (Testimony of William R. Lummis ["Lummis Test."], A. 119) will be subjected to state death taxes by both Texas and California. This threat exists because in the absence of a unitary determination in a federal interpleader action, the state courts of both Texas and California are likely to determine that Mr. Hughes was domiciled in their respective jurisdictions at death, thus enabling the states to assess death taxes against the Estate. Both the California tax officials ("Cory and Alvord") and the Texas tax officials ("White and Bullock") assert the right to tax the intangible assets on the same basis, that Mr. Hughes died domiciled within their respective states.

The Internal Revenue Service computes the gross value of the Estate to be approximately $465,000,000 (Lummis Test., A. 122). The California Inheritance Tax Referee values the gross estate at $1,106,345,516 (R. I, 106, 107).[4] The Administrators of the Estate value the gross estate at $166,800,000 (Lummis Test., A. 125). In the event that the Internal Revenue Service assesses estate taxes at the applicable rate of approximately 77%, less 16% for a state death tax credit or approximately 61%, together with the state of Texas at the applicable rate of approximately 16% and the state of California at the applicable rate of 24%, the Estate would have federal

4. References to the record are by volume and page.

and state death taxes assessed against it at the rate of approximately 101%, in the amount of $763,400,000 including interest (Lummis Test., A. 125).[5] The total tax that would be due and owing from the Estate if the federal, Texas, and California tax authorities were all permitted to assess and collect their asserted taxes against the Estate is thus one and two thirds greater than the value placed on the entire gross estate by the Internal Revenue Service and more than four times the gross value reported by the Estate.

B. Administration Proceedings

Mr. Hughes died on April 5, 1976. During that year administration proceedings with respect to his Estate were commenced in the probate courts of Texas, California, Nevada, Delaware, and Louisiana, where assets of the Estate were located. All five administrations are currently active and pending.

The domicile issue was tried before a jury in Probate Court # 2, Harris County, Texas, and on April 10, 1978, judgment was entered that Mr. Hughes was domiciled in Texas at the time of his death. Cory and Alvord were not parties to that proceeding. Lummis, who contended that Mr. Hughes died domiciled in Nevada, timely perfected an appeal of that judgment and it is therefore not operative as *res judicata* under Texas law.

California death tax proceedings were initiated with the appointment of an Inheritance Tax Referee who has

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5. This assumes that the Internal Revenue Service uses its valuation, that the Texas officials' valuation is approximately that of the Internal Revenue Service, and that the California officials use their own valuation.

stated his intent to file a report claiming that Mr. Hughes was domiciled at death in California and that the entire Estate, excluding real and tangible personal property located outside California, but including all intangible assets wherever located, is subject to California inheritance taxation (R. I, 106-107).

The vast majority of the assets of the Estate consist of the stock of Summa Corporation, a Delaware corporation wholly owned by Mr. Hughes at the time of his death (Lummis Test., A. 119). The Delaware Chancery Court has entered an order requiring Summa, until further order, to recognize Lummis, in his capacity as Ancillary Administrator of the Estate in Delaware, as the sole shareholder of Summa (Lummis Test., A. 120). The domicile issue has been pending in the Nevada administration since the completion of the seven-month "Mormon Will" trial where a jury adjudged that document to be a forgery. Mr. Hughes' domicile at death is not at issue in the Louisiana proceeding.

The Texas tax officials appeared in the Delaware proceeding and the Texas Attorney General appeared in the Nevada proceeding, but they now disclaim that their appearances were general appearances and take the position that they will not be bound by and will not accord recognition to any judgment as to domicile in any proceeding outside the state of Texas. The California tax officials claim to have made no appearance in any proceeding outside the state of California and take the position that they will not be bound by and will not accord recognition to any judgment as to domicile in any proceeding outside of California.

C. The Federal Interpleader Action

Three weeks after the Court's ruling in *California v. Texas,* Lummis filed a bill in the nature of interpleader, later amended, in the United States District Court for the Western District of Texas, Austin Division. The Texas tax officials and the California tax officials each filed a motion to dismiss, asserting that the action was barred by the Eleventh Amendment and that the federal interpleader requirement that there be two or more adverse claimants of diverse citizenship who claim or may claim entitlement to the fund was not met. The district court granted the motions, holding that it lacked jurisdiction over the action.

Lummis timely appealed to the United States Court of Appeals for the Fifth Circuit. An injunction pending appeal was issued by the Court of Appeals, and in reliance on that injunction, the Texas Court of Civil Appeals stayed the appeal of the Texas domicile judgment pending the outcome of the federal interpleader action.

The Court of Appeals held that the district court had jurisdiction over this interpleader action and reversed and remanded the case.[6] The Petition for Rehearing en Banc filed by Cory and Alvord was denied, as was their later Motion for Leave to File Petition for Rehearing Out Of Time.

All parties are presently enjoined, under the injunction pending appeal, from litigating the issue of Mr. Hughes'

6. The Court of Appeals declined to consider the issue of whether the United States had been properly joined as an interpleader claimant under 28 U.S.C. § 2410(a) because this issue had not previously been decided by the district court. (Pet. App. 13a, n. 14). The Court of Appeals remanded the issue to the district court for decision.

domicile at death other than in this interpleader action. However, if interpleader jurisdiction is not sustained by this Court, the Estate will once again be faced with the threat of double state death taxation and the certainty of multiple, vexatious, and unnecessary litigation.

SUMMARY OF ARGUMENT

This interpleader action was brought at the suggestion of four Justices in *California v. Texas,* 437 U.S. 601 (1978), who indicated that perhaps statutory interpleader as a remedy for the dilemma caused by multistate death taxation is an idea whose time has finally come. Lummis therefore joined in this action the tax officials of Texas and California, the other Administrators of the Estate, and the United States, in an effort to obtain one final adjudication binding all interested parties and all parties who claim or may claim to be entitled to the interpleader fund.

There is no present controversy between the states of Texas and California which requires the exercise of this Court's original jurisdiction. Such a controversy will not arise if this interpleader action resolves the question of which state's tax officials, if either, are entitled to assess death taxes against the intangible assets of the Estate.

The Eleventh Amendment is no bar to this action. As noted by the four Justices in *California v. Texas,* the holding in *Worcester County Trust Co. v. Riley,* 302 U.S. 292 (1937), has been substantially eroded by subsequent decisions of this Court. Moreover, *Edelman v. Jordan,* 415 U.S. 651 (1974) suggests that there has

been a shift in focus in resolving Eleventh Amendment issues, from alleged wrongdoing (unconstitutionality or other illegality) to the nature of the relief sought. Whether measured against the *Edelman* standard or the more traditional standard of alleged wrongdoing, the Eleventh Amendment is nevertheless not a bar to this action. No party to this action challenges the fact that Lummis seeks only prospective injunctive, declaratory relief. Moreover, if *Worcester County* is still considered viable, it is not dispositive of this action because the two cases are distinguishable.

This is a classic bill in the nature of interpleader. Would-be creditors from two different states assert conflicting claims to the same assets; Lummis denies liability to both. The action abounds with the requisite adverse claimants of diverse citizenship, *i.e.*, Cory and Alvord, citizens of California; White and Bullock, citizens of Texas; and Lummis and First National Bank of Nevada, citizens of Nevada.

The Court of Appeals correctly determined that this action was properly brought under the Federal Interpleader Act, in that Lummis the interested stakeholder, and Alvord the Treasurer of Los Angeles County, are adverse, diverse claimants under the statute. The recent change in California law does not affect jurisdiction over this action. Moreover, the Court of Appeals properly concluded that the joinder of parties sought by Cory and Alvord was unnecessary and that transfer of the case to the District of Colorado under 28 U.S.C. § 1404(a) was unnecessary. The interests of justice, fairness to all parties, and judicial economy call for this Court to uphold federal interpleader as the appropriate vehicle for resolving the issues presented in this action.

ARGUMENT

I. STATUTORY INTERPLEADER JURISDICTION OVER THIS ACTION IS NOT PREEMPTED BY 28 U.S.C. § 1251(a).

Cory and Alvord assert that this action is, in reality, a controversy between two states, and therefore, is subject to the jurisdiction of this Court under 28 U.S.C. § 1251(a). Because this jurisdiction is original and exclusive, the argument goes, the interpleader action will not lie because a federal district court lacks jurisdiction.

This argument proceeds from a false premise—that this is a controversy between two states. In denying the state of California's earlier motion for leave to file an original action, this Court has already rejected the notion that there is a present controversy between two states. As Justice Stewart carefully explained in his concurring opinion, this is not yet a dispute between two states. *California v. Texas*, 437 U.S. at 610-11 (Stewart, J. concurring).

This action in the nature of interpleader pits Lummis, as interested stakeholder, against the adverse claims of White and Bullock, on the one hand, and of Cory and Alvord, on the other. While the tax officials' claims are certainly adverse to each other, there is no present "controvers[y] between two . . . States" under 28 U.S.C. § 1251(a). The claimant tax officials have, at present, no cause of action against each other. They cannot, of course, sue each other to recover the death taxes they contend they are owed. Their only present claims are against the interpleader fund, *i.e.*, the intangible assets of the Estate.

It is only if the intangible assets of the Estate prove insufficient to satisfy the claims by both states that this action would ripen into a controversy between two states. The intangible assets of the Estate cannot be insufficient to satisfy both claims if this interpleader action determines that the tax officials of only one state are entitled to impose a death tax (or neither, if this action determines that Mr. Hughes died domiciled in Nevada). *See California v. Texas*, 437 U.S. at 601-602 (Brennan, J., concurring).

Petitioners have posed the wrong question. The initial question before the Court is not whether this case is a controversy between two states, for it clearly is not—at least not yet. As Justice Stewart noted:

> In reality the facts in *Texas v. Florida*, as well as the allegations in the complaint now before us, contain the seeds of two distinct lawsuits. One is a dispute between two States as to the proper division of a finite sum of money. The other is a suit in the nature of interpleader to settle the question of a decedent's domicile for purposes of the taxes to be imposed upon his estate. But the suit in the nature of interpleader is not within the original and exclusive jurisdiction of this Court because it is not a dispute between States. (*California v. Texas*, 437 U.S. at 610-11)

The question then is whether this dispute over Mr. Hughes' domicile is capable of being resolved under the Federal Interpleader Act. For if it is, then there will be no controversy between the states.

II. STATUTORY INTERPLEADER IS AVAILABLE TO THIS ESTATE FOR RESOLVING THE THREAT OF MULTIPLE DEATH TAXATION.

On November 10, 1977, the state of California filed a motion for leave to file a complaint in this Court seeking to invoke the Court's original jurisdiction.[7] In both its briefs and in oral argument, California relied heavily on *Texas v. Florida*, 306 U.S. 398 (1939), claiming that the situation facing the Hughes Estate, in which two states assert conflicting claims of domicile and threaten with their tax assessments to exhaust the assets of the Estate, was identical to that presented in *Texas v. Florida*.

This Court, however, did not find *Texas v. Florida* controlling and denied California's motion for leave to file an original action. Justice Stewart, in a concurring opinion, carefully explained that the problem facing both the estate in *Texas v. Florida* and the Hughes Estate was not a conflict between the states themselves which would provide the basis for the exercise of the Court's original and exclusive jurisdiction, but rather was a conflict between the Estates on the one hand and the competing states on the other. *California v. Texas*, 437 U.S. at 611 (Stewart, J., concurring).

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7. Prior to that date, the Estate and the state of California had concluded a provisional settlement agreement of the California domicile claim. This matter was brought to the Court's attention as an appendix to the brief of the State of Texas and in oral argument in that action. The provisional agreement was expressly conditioned upon the Court's accepting jurisdiction over that action, a condition which was not fulfilled because the motion for leave to file the bill of complaint was denied by the Court on June 22, 1978. Since the commencement of the present interpleader action, Lummis and the California and Texas tax officials have been actively adverse to each other.

The concurring opinions in *California v. Texas* provided an alternative to the dilemma, however, in suggesting that the remedy of federal interpleader is available to the Hughes Estate. The concurring Justices noted that the Eleventh Amendment, which had been considered a bar in *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937), was no longer an obstacle because of the Court's more recent interpretation of the Eleventh Amendment in *Edelman v. Jordan*, 415 U.S. 651 (1974). In concluding that a federal interpleader action is available to the Hughes Estate, Justice Stewart noted Professor Chafee's recognition of the problem created by *Worcester County*:

> It is, [Professor Chafee] observed, "highly unfair for both state governments to tell the taxpayer, 'You have to pay only one tax,' and then make him pay twice." [citation omitted] He pointed out that the paradox of inconsistent adjudications of a theoretically single domicile is one created by our federal system of government: "In a nation with a unified government, the situation in which estates of decedents are here left remediless would be impossible. Either only one agency would impose death taxes, or else a single court of review would determine domicile as between two local taxing agencies. . . . Somewhere within that federal system we should be able to find remedies for the frictions which that system creates." [citation omitted] I believe such a remedy is now available. See n. 10, *infra*. (*California v. Texas*, 437 U.S. at 608, n. 9)

Petitioners Cory and Alvord, however, contend that what Chafee really meant was that the remedy can come only through "legislative solution," and that this Court

should not indulge in "judicial rewriting" of an "unambiguous" statute (Pet. Br. at 47). Lummis agrees that the Federal Interpleader Act is unambiguous, but cannot agree that, by its silence on the issue, the statute was designed to exclude state officials from its scope. It is *Worcester County's* holding, that the Eleventh Amendment was a bar to interpleader actions against state tax officials, that is in issue here. As will be shown below, this Court has, through interpretation of the Eleventh Amendment subsequent to *Worcester County*, already provided the basis for holding that it has no application when only prospective relief is sought against a state official.

III. THE ELEVENTH AMENDMENT DOES NOT BAR THIS INTERPLEADER ACTION.[8]

A. This Action Invokes the *Edelman v. Jordan* Doctrine of Prospective Relief.

The Eleventh Amendment was passed in 1794 in reaction to the holding in *Chisholm v. Georgia*, 2 U.S. (2

8. In their Brief in the Court of Appeals and in argument before that Court, Cory and Alvord abandoned the Eleventh Amendment defense which they had asserted in the district court. In fact, at oral argument before that Court, Counsel for Petitioners, Mr. Falk, agreed in principle that federal interpleader is proper in this case:

> MR. FALK: No, we don't want to play any procedural game. And I understand why the result [dismissal of the interpleader suit by the district court] in this case is unacceptable. It's unacceptable to us as well. We agree with the estate that federal interpleader ought to be used in this case. We do not assert the Eleventh Amendment, and we are willing to submit to the federal interpleader act.

(Transcript, Oral Arguments, March 31, 1980, at 19)

This abandonment and waiver continued into their Petition for Certiorari in this Court. Although the Eleventh Amendment "partakes of the nature of a jurisdictional bar," it is equally clear that

Dall.) 419 (1793), that a private individual could sue a state in the Supreme Court for recovery of a debt. Thus the Amendment was intended from the outset to protect state treasuries against collection of state debts. It has, however, historically been the rule that state officials alleged to be acting unconstitutionally or otherwise illegally may not assert the Eleventh Amendment as a bar to actions brought against them. *Ex parte Young*, 209 U.S. 123 (1908); *Reagan v. Farmers' Loan & Trust Co.*, 154 U.S. 362 (1894); *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). In each of these cases, the relief sought was prospective in nature; but the Court, in holding that the actions were not barred by the Eleventh Amendment, focused on the allegations of wrongdoing, rather than on the relief sought against the officials, in "stripping" the officials of their Eleventh Amendment immunity. The Court continued its examination of wrongdoing by state officials in *Worcester County* and held that because there was no constitutional impediment to double taxation, the action was barred by the Eleventh Amendment.

The Court began to shift its focus from allegations of wrongdoing to the nature of the relief sought in *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 464 (1945), which held that when "the action is in essence one for the recovery of money from the state, the

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it may be waived. *Edelman v. Jordan*, 415 U.S. at 678; 12 MOORE'S FEDERAL PRACTICE § 300.03[3.-5] (1981). Having thus been waived, this issue is not properly before the Court. Rules 21.1(a) & 34.1(a), SUPREME COURT RULES. Nevertheless, since the issue has been presented in the Brief for Petitioners, Lummis must reply, subject to his claim that the purported Eleventh Amendment defense by Cory and Alvord has, indeed, been waived.

state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suits even though individual officials are nominal defendants." The Court held that the Eleventh Amendment was a bar to the retroactive relief sought there. In *Edelman v. Jordan*, 415 U.S. 651 (1974), however, the plaintiff sought both retroactive and prospective relief. Thus the Court was afforded the opportunity to explain the retroactive relief —prospective relief dichotomy: "This case, therefore, is the first opportunity the Court has taken to fully explore and treat the Eleventh Amendment aspects of such relief in a written opinion." (415 U.S. at 670-71) This Court held that if the relief sought is prospective in nature and does not seek retroactive relief, *i.e.*, payment of funds from the state treasury, the suit does not fall within the prohibition of the Eleventh Amendment. The shift in focus from wrongdoing to relief having been completed, cases subsequent to *Edelman* have dealt with the Eleventh Amendment issue on the basis of the relief sought. *See Quern v. Jordan*, 440 U.S. 332 (1979); *Hutto v. Finney*, 437 U.S. 678 (1978); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Maria Santiago v. Corporacion de Renovacion*, 554 F.2d 1210, 1212 (1st Cir. 1977).

Edelman, significantly, did not discuss the concept of "stripping" officials of their Eleventh Amendment immunity but rather focused on the nature of the relief sought. While the allegation of wrongdoing, under 28 U.S.C. § 1331 and § 1343(a)(3) and (4), provided the plaintiff with federal subject-matter jurisdiction, there is no suggestion that these allegations provided the foundation for the Court's resolution of the Eleventh Amendment issues. It is by no means certain then, particularly since

Edelman, that allegations of unconstitutionality or other illegality are necessary to prevent an official from cloaking himself with an Eleventh Amendment defense if an action seeks only prospective relief.

The concurring opinions in *California v. Texas* reaffirm the *Edelman* holding that it is the nature of the relief sought that is determinative of whether the Eleventh Amendment is a bar. Those opinions seem to suggest that allegations of unconstitutionality or other illegality may not be necessary in this interpleader action which seeks only prospective relief against state officials. Nonetheless, if this Court is of the opinion that such allegations are still required after *Edelman*, substantial allegations are contained in Lummis' Complaint and are discussed in Section III, B and C, *infra*.

Finally, it must also be recognized that interpleader, as an equitable remedy, contemplates, by its very nature, a unique type of "wrongdoing" and fashions an appropriate remedy. The wrongdoing intended to be remedied by statutory interpleader is the refusal of two or more adverse claimants to submit their claims against the fund to the jurisdiction of one court and the concomitant threat to the stakeholder of vexatious litigation and multiple liability on a single obligation. *See* 3A Moore's FEDERAL PRACTICE § 22.02[1] (1978). The remedy fashioned permits the stakeholder to interplead the adverse claimants, thus subjecting them to the jurisdiction of the federal court, in order to obtain prospective relief that binds them in a single adjudication and eliminates the threat of multiple liability on a single obligation.

B. This Action Alleges Unconstitutional Activity By The Tax Officials.

The Eleventh Amendment provides no immunity from suit for officials who are alleged to be engaging in unconstitutional activity. The tax officials of Texas and California assert that a judgment rendered in the courts of either state is not binding upon the tax officials of the other state if they are not parties to the other suit. Yet Cory and Alvord and White and Bullock have resisted a unitary adjudication in this action, thus depriving the Estate of constitutional due process as enunciated in *Western Union Tel. Co. v. Pennsylvania,* 368 U.S. 71 (1961).[9]

In *Western Union,* the telegraph company was threatened by two states seeking to escheat unclaimed intangible funds held by it. The company claimed no right to the fund but did not want to pay the money to one state, without some guarantee that the other state would not attempt, as it threatened, to collect a similar amount. In holding that Pennsylvania's effort to escheat the unclaimed funds was a denial of due process, the Court reasoned:

> And our prior opinions have recognized that when a state court's jurisdiction purports to be based, as here, on the presence of property within the state, the holder of such property is deprived of due process of law if he is compelled to relinquish it without assurance that he will not be held liable again in another jurisdiction or in a suit brought by a claim-

9. This conduct also gives rise to Lummis' claim under 28 U.S.C. § 1331.

ant who is not bound by the first judgment. (*Id.* at 75)[10]

Western Union is closely parallel to this interpleader action with its present composition of parties. In *Western Union*, the company holding the intangible fund did not want to pay money to one state, without some guarantee that the other state would not attempt, as it threatened, to collect the same fund. Both states were basing their right to collect the fund on the principle that the fund was "located" in the state. This same fiction, that intangible assets are "located" within the state of a decedent's domicile, serves as the jurisdictional basis for assessment of death taxes against the estate of a decedent.

Western Union held that due process requires more than that just due procedure be given when property is taken. This Court said that the due process clause of the Fourteenth Amendment prohibits a state from instituting proceedings aimed at taking a stakeholder's property unless the state can also protect that person from being ordered by another state to pay the same obligation a second time. 368 U.S. at 75. Here neither set of tax officials should be permitted to take property from this

10. Cory and Alvord contended in the Court of Appeals that *Western Union* is distinguishable from this case, and relied on *California v. Texas* in support of that assertion. *Western Union* is properly distinguishable from *California v. Texas*, but only because in *Western Union* the aggrieved stakeholder, the Western Union Company, was before the Court. In *California v. Texas*, the aggrieved party and stakeholder, the Estate, was not before the Court. It is not surprising therefore that Justice Stewart believed that the "situation in which [*California v. Texas*] arises is quite different [from *Western Union*]." (*California v. Texas*, 437 U.S. at 612, n. 13)

Estate unless they can also protect it against liability from the other's domicile-based claim.[11]

A second constitutional violation exists because the Texas and California tax officials' attempts to collect domicile-based death taxes on the same intangible assets of the Estate impermissibly penalize the Estate for Mr. Hughes' exercise of his constitutionally protected right to travel. A right of action to seek redress of this deprivation exists under 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (a)(3).

The right to travel has a long history of protection and recognition by this Court. *United States v. Wheeler*, 254 U.S. 281 (1920); *Twining v. New Jersey*, 211 U.S. 78 (1908); *William v. Fears*, 179 U.S. 270 (1900); *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35 (1868); *Passenger Cases*, 48 U.S. (7 How.) 282 (1849). In its most notable treatment in recent times, the Court, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), stated:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regula-

11. The situation confronting the Western Union Company and this Estate is different from that involved in *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174 (1942), in which the Court permitted both the state of domicile (New York) and the state of incorporation (Utah) to impose taxes upon the transfer at death of shares of stock that were part of the decedent's estate. *Aldrich* allowed the imposition of death taxes by two states only because each had a *different* jurisdictional basis for doing so. In the present case, by contrast, this Estate is faced with claims by two sets of tax officials who are basing their authority to tax on *identical and mutually exclusive jurisdictional bases.*

> tions which unreasonably burden or restrict this movement. (*Id.* at 629)

The right to travel is well-established in our federal system, and state officials may not impose penalties or undue restrictions upon the exercise of that right. *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Harman v. Forssenius*, 380 U.S. 528 (1965). It is beyond dispute that Mr. Hughes' exercise of his right to travel is being penalized under the facts of this case. Mr. Hughes, as is becoming increasingly common in our society, chose not to reside for his entire lifetime in only one jurisdiction. However, because of the exercise of his right to travel, his Estate faces the penalty of costly, repetitious, and unwarranted litigation because of multiple claims and multiple liability based on a single obligation.

The impermissible assessment of domicile-based death taxes on the Estate's intangibles by both the Texas and California tax officials, when combined with the federal estate tax, will consume the entire Estate. Such a result is an intolerable penalty upon one's exercise of his right to travel, because "state[s] may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943).[12]

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12. The proper party to assert Mr. Hughes' right to travel is his personal representative Lummis. If Mr. Hughes' personal representative were not permitted to assert his right on behalf of Mr. Hughes, the Estate would face the specter of total depletion by state and federal taxation. The injury, therefore, is to the Estate and the injury "in fact" requirement for assertion of constitutional rights is satisfied. *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978); *Flast v. Cohen*, 392 U.S. 83 (1968). Because it is now impossible for Mr. Hughes to assert this right, his personal rep-

Cory and Alvord contended in the Court of Appeals that Mr. Hughes, as a "multinational recluse," is himself to blame for the threat of double taxation of the intangible assets of his Estate. If Mr. Hughes is responsible for the dilemma in which his Estate finds itself, it is a responsibility without blame because he is constitutionally permitted to travel without fear that his exercise of this right will result in a penalty being imposed upon his Estate. *See Shapiro v. Thompson, supra.*

C. This Action Alleges Other Illegal Activity By The Tax Officials.

It has long been held that even if the statute under which an official is acting is not alleged to be unconstitutional, he may nevertheless be sued as an individual if his actions are alleged to be outside the parameters of the statute and therefore illegal. *Poindexter v. Greenhow,* 114 U.S. 270 (1885). The Court defined this principle in *Reagan v. Farmers' Loan & Trust Co.,* 154 U.S. 362 (1894):

> Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an

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resentative may do so to protect property rights that were vested in Mr. Hughes, and at the time of his death, vested in his personal representative. *See Barrows v. Jackson,* 346 U.S. 249 (1953).

> illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts. (154 U.S. at 390-91)

See also Greene v. Louisville & I. R. Co., 244 U.S. 499 (1916).

Like the plaintiff in *Reagan*, Lummis does not challenge the constitutionality of the statutes under which the tax officials of Texas and California seek to proceed. Because he alleges that Mr. Hughes died domiciled in Nevada, Lummis does however challenge the legality of their attempts to assess death taxes against the intangible assets of this Estate under the death tax statutes of Texas and California.

As the Court of Appeals correctly noted, "Under the common law of Texas as well as that of California, a decedent has only one domicile for death tax purposes. *California v. Texas*, 437 U.S. at 603, 98 S.Ct. at 3109 (Stewart, J., concurring); *see Texas v. Florida*, 306 U.S. at 408, 59 S.Ct. at 568." (Pet. App. at 12a). Texas and California law both provide that the intangible property to be taxed be within the jurisdiction of the state, *i.e.*, the property of a domiciliary decedent. TEX. TAX.—GEN. ANN. art. 14.01 (Supp. 1978); CAL. REV. & TAX. CODE § 13303(a) and 13401 (1970). According to the law of each state, neither set of tax officials has authority to collect a domicile-based death tax if Mr. Hughes was not domiciled in their state at death.

In deciding issues of jurisdiction, federal courts accept as true all well-pleaded allegations of the Complaint.

Scheuer v. Rhodes, 416 U.S. 232 (1974); *Cruz v. Beto*, 405 U.S. 319 (1972). The application of the law of each state to the well-pleaded fact that Mr. Hughes was domiciled in Nevada at death results in the conclusion that the attempts by each state's tax officials to assess domicile-based death taxes upon the intangibles of the Estate are illegal.[13] Under *Reagan* and *Greene*, the unlawful activity of the tax officials, in attempting to collect domicile-based taxes from the Estate, removes the officials from the protective scope of the Eleventh Amendment and makes them personally amenable to this interpleader action.

D. This Action Is Distinguishable From The Holding In *Worcester County Trust Co. v. Riley*.

Even if *Worcester County* is considered by the Court to still be viable, it should not control the disposition of this interpleader action because the two cases are distinguishable.[14] In the present interpleader, Lummis has

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13. Cory and Alvord maintained in the Court of Appeals that they are merely making "good faith" assertions as to domicile in order to collect death taxes against the Estate. They maintain that as officials of the state they have the authority to make a decision as to domicile and that their "good faith" efforts to collect taxes based on that decision cannot amount to illegal activity. "Good faith" assertions by the state tax officials do not in themselves deprive a federal district court of jurisdiction. Were this the law, no plaintiff would be able to call into question any activities of a state official if the official could raise as a defense the assertion that he is acting in good faith. Certainly nothing in the judicial interpretation of the Eleventh Amendment calls for such a conclusion and common sense dictates to the contrary.

14. While *Worcester County* was recently cited in *Alabama v. Pugh*, 438 U.S. 781 (1978), it was cited for the proposition that a suit could not be maintained against the State of Alabama and its

alleged his good faith belief that Mr. Hughes died domiciled in Nevada and that the claims of *both* sets of tax officials are without merit and that their actions are without any valid legal authority. By contrast, as noted in the First Circuit opinion in *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir. 1937), the plaintiff could not allege that both sets of officials were acting illegally because he conceded that the decedent was domiciled in one of the two states. If only one set of officials was acting illegally and therefore could be sued as individuals, the other set would still be acting lawfully and as representatives of the state, with Eleventh Amendment protection. The First Circuit said:

> It is also to be noted that *neither one nor both of the respondents*, as tax officials of the respective states, *are charged with acting in violation of the laws of their respective states. . . . (Riley v. Worcester County Trust Co.*, 89 F.2d 59, 65 (1st Cir. 1937)) (Emphasis added.)

In this Court, Justice Stone made the same observation:

> Petitioner does not contend that respondents, the California officers, propose to do more than invoke the action of its courts to assess a lawful tax and to seek there a judicial determination that decedent was domiciled in California as the basis of its power to impose the tax. (*Worcester County Trust Co. v. Riley*, 302 U.S. at 298-99)

Unlike the plaintiff in *Worcester County*, Lummis here alleges unconstitutional and other illegal activity

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Board of Corrections. Injunctions issued *against the state officials*, however, were allowed to remain in effect. *Alabama v. Pugh*, in this respect, is a reaffirmation of the holding in *Edelman*.

on the part of both sets of state tax officials, because Mr. Hughes died domiciled, not in Texas or California, but in Nevada. Under Texas and California law, a tax official has no authority to collect domicile-based taxes unless the decedent is domiciled in the state at death. This case is therefore distinguishable from *Worcester County* because the deficiencies noted by the courts in *Worcester County* do not exist here.

IV. THE REQUIREMENTS FOR STATUTORY INTERPLEADER, ADVERSITY AND DIVERSITY, ARE SATISFIED IN THIS ACTION.[15]

A. The Tax Officials Are "Citizens Of Different States" For Purposes Of Interpleader Jurisdiction.

Cory and Alvord and White and Bullock admit that their individual citizenships are those of California and Texas respectively (A. 85, 92, 79, 82). The Court of Appeals did not find it necessary to rely on the diversity of their citizenship, having found the requisite minimal diversity to exist between Lummis and Alvord. (See Section IV, B, *infra.*) Cory and Alvord, however, contend that their citizenship may not be considered for diversity purposes because they function as officials of the state and, their argument goes, a state is not a citizen of itself.

However, in considering whether a suit against a state official is properly brought, the key inquiry is whether

15. Adversity is not in issue here because all parties concede that the claims asserted by Cory and Alvord, White and Bullock, and Lummis are adverse to each other.

the state official is the real party in interest. *Quern v. Jordan*, 440 U.S. 332, 345, n. 17 (1979), citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat) 738 (1824). If a suit seeks money damages from a state treasury, the state is the real party in interest and, unless waived or overridden by congressional enactment, the suit will be barred by the Eleventh Amendment. *See Ford Motor Co. v. Dept. of Treasury of Indiana, supra.* On the other hand, if the suit seeks only injunctive and declaratory relief, as here, the state is not the real party in interest, the Eleventh Amendment is no bar and the state officials should be regarded as individuals, as all other defendants are. *See Edelman v. Jordan, supra.*

The starting point in analyzing whether jurisdiction exists over any person for diversity purposes is that he is a citizen of the state in which he resides. U. S. CONST. amend. XIV, § 1. If a defendant state official wants to avoid suit as a citizen of his state, he must show that the state is the real party in interest in the suit in order to cloak himself with the state's Eleventh Amendment protection. But under *Ford Motor* and *Edelman*, the state is not the real party in interest if the suit seeks only prospective and not retroactive relief. The suit is either against the state or it is not. If it is not, the state official does not enjoy any Eleventh Amendment immunity from suit. Like any other citizen of a state, his citizenship may be looked to for diversity purposes.[16]

This analysis has permitted federal courts to look to the citizenship of state officials in instances where there

16. The Fourteenth Amendment defines an individual's citizenship: "All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside." U.S. CONST. amend. XIV, § 1.

have been allegations of unconstitutional or other illegal activity. For example, in *Mouton v. Sinclair Oil & Gas Co.*, 410 F.2d 717, 718 (5th Cir. 1969), *cert. denied*, 398 U.S. 957 (1970), the Fifth Circuit held that "the federal court has jurisdiction . . . under diversity of citizenship, 28 U.S.C. § 1332, in that the [Louisiana] collector [of Revenue] is acting unconstitutionally and therefore in an individual capacity and not as the official representative of the State of Louisiana. . . ." *Accord, Great Western United Corp. v. Kidwell*, 577 F.2d 1256 (5th Cir. 1978), *rev'd on other grounds, sub nom., Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979); *State of Ohio ex rel. Seney v. Swift & Co.*, 270 F. 141, 151 (6th Cir.), *cert. denied*, 257 U.S. 633 (1921); *State Life Insurance Co. v. Daniel*, 6 F. Supp. 1015 (W.D. Tex. 1934).

The principle that the citizenship of state officials may be considered for diversity purposes is equally true in cases that do not involve the Eleventh Amendment. In *Ex parte Nebraska*, 209 U.S. 436 (1908), a removal action, the Court held that diversity existed between the state officials of Nebraska and a non-resident corporation, and even the naming of the state as a party did not in itself defeat diversity jurisdiction where the state was not the real party in interest.[17]

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17. By further analogy, the sovereign immunity of the federal government presented no obstacle and the individual citizenship of the Attorney General of the United States provided a basis for original jurisdiction in a suit brought to enjoin the enforcement of certain provisions of the Voting Rights Act of 1965. The Court based its finding of original jurisdiction on "the presence of a controversy between a state [South Carolina] and a citizen of another state [the Attorney General, a citizen of New York] under Art. III § 2 of the Constitution." *South Carolina v. Katzenbach*, 383 U.S. 301, 307 (1966).

Cory and Alvord cite cases for the proposition that the citizenships of state officials cannot be looked to for diversity purposes (Pet. Br. at 27, n. 35). These cases are inapplicable to this action, because either (1) the state officials were suing as plaintiffs and the state was found to be the real party in interest,[18] or (2) retroactive monetary damages were sought,[19] or (3) the action was held to be a violation of 28 U.S.C. § 1341 because a plain, speedy and efficient remedy was available in the state court,[20] or (4) there was no allegation of unconstitutional or other illegal activity on the part of the state officials who were parties to the suits.[21] In *Riley v. Worcester County Trust Co.*, the plaintiff had failed to allege that any official was acting without legal warrant. Taking note of this defect, the First Circuit said,

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18. *People ex rel. McColgan v. Bruce*, 129 F.2d 421 (9th Cir.), *cert. denied*, 317 U.S. 678 (1942); *Craig v. So. Natural Gas Co.*, 125 F.2d 66 (5th Cir. 1942); *Robertson v. Ingram-Day Lumber Co.*, 271 F. 1023 (5th Cir. 1921); *Robertson v. Jordan River Lumber Co.*, 269 F. 606 (5th Cir. 1921); *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D. S.C. 1943).

19. *State Highway Comm'n v. Utah Constr. Co.*, 278 U.S. 194 (1928).

20. *Kansas City Southern R. R. Co. v. Morley*, 88 F. Supp. 300 (W.D. Ark. 1950). The prospect of multiple state taxation was precisely the issue which led the court, in *U. S. Steel Corp. v. Multistate Tax Comm'n*, 367 F. Supp. 107, 115 (S.D. N.Y. 1973), to hold that section 1341 was not a bar to that action: "The reference to 'such state' in § 1341 clearly indicates that the statute contemplated that the taxing authority of only one state be involved. . . ." This prospect of multiple taxation effectively removes the present action from the ambit of section 1341, a factor noted by Justice Stewart in *California v. Texas*, 437 U.S. 608 at n. 10.

21. *Riley v. Worcester County Trust Co.*, 89 F.2d 59 (1st Cir.), *aff'd*, 302 U.S. 272 (1937).

> If there was such an allegation with respect to the determination of domicile by both sets of officials, *they could be regarded as sued as individuals*, (emphasis added) for the acts which they would be charged with having done would be in violation of law, unless it could be said from a consideration of the complaint as a whole that the *relief sought* was against the states, and not the officials personally. (*Id.* at 65)

As noted above, cases since *Worcester County* have made it clear that prohibited "relief sought" is retroactive relief, whereas prospective relief is permissible. Therefore the rule that a state is not a citizen of itself has no application here and the citizenships of the tax officials are relevant for diversity purposes.

B. The Court Of Appeals' Finding Of Minimal Diversity Is Correct.

1. Diversity Exists Between Lummis, As Interested Stakeholder (A Citizen Of Nevada) And Alvord, Treasurer Of Los Angeles County (A Citizen Of California).

The Court of Appeals properly found that the remedy of statutory interpleader is available to Lummis because the requisite adversity and diversity exist between two of the claimants to the fund in this case: (1) Lummis, the interested stakeholder who is a citizen of Nevada, and (2) H. B. Alvord, the County Treasurer of Los Angeles who is a citizen of California.

Cory and Alvord claim, as they did in the Court of Appeals, that the citizenship of an interested stakeholder

may not be looked to for diversity purposes because it has never been done before, and to do so might lead to an unwarranted or undesirable expansion of federal jurisdiction. In holding that the citizenship of an interested stakeholder may be considered for purposes of establishing diversity under Section 1335, the Court of Appeals was deciding an issue of first impression.[22] Its ruling, however, is consistent with the line of cases in which this Court has interpreted the interpleader statute liberally in order to foster its use as an equitable remedy. *See, e.g., State Farm Fire & Cas. Co. v. Tashire, supra; Treinies v. Sunshine Mining Co., supra. See also Haynes v. Felder,* 239 F.2d 868 (5th Cir. 1957); *Builders & Developers Corp. v. Manassas Iron & Steel Co.,* 208 F. Supp. 485, 488 (D. Md. 1962); *Pan Am. Fire & Cas. Co. v. Revere,* 188 F. Supp. 474, 477, n. 8 (E.D. La. 1960); 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1710, at 406 (1972) (hereinafter "WRIGHT").

In *California v. Texas,* Justice Stewart, in defining the role of an interested stakeholder, indicated that the stakeholder bringing a bill in the nature of interpleader is an interested claimant:

> In true interpleader the stakeholder bringing suit asserts no interest in the fund. The bill in the nature of interpleader, by contrast, allows an interested claimant to seek adjudication of all claims to the

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22. The Court in *Treinies v. Sunshine Mining Co.,* 308 U.S. 66 (1939) did address the issue of considering the citizenship of a stakeholder for diversity purposes. However, it involved a disinterested stakeholder and the issue of whether an interested stakeholder's citizenship can be used to satisfy minimal diversity remained open. *See also State Farm Fire & Cas. Co. v. Tashire,* 386 U.S. 523 (1967).

fund including his own. 437 U.S. at 605, n. 5 (1978), citing *Texas v. Florida*, 306 U.S. 398, 406 (1939).[23]

Since, by this definition, Lummis qualifies as a claimant it logically follows that he qualifies as a claimant for all purposes because the interpleader statute does not draw distinctions among claimants.[24] The Court of Appeals properly concluded that Lummis was an interested stakeholder, and therefore an interpleader claimant, because as administrator he has a legal duty to preserve the assets of the estate and to protect those assets against double death tax liability, because he asserts that Mr. Hughes died domiciled in Nevada and because he stands to collect an administrator's fee (Pet. App. at 10a).

Unable to successfully attack Lummis' status as a claimant, Cory and Alvord raise the specter that the finding will have radical effects upon federal jurisdiction.

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23. The Court of Appeals defined the interested stakeholder's role in the same manner, "A stakeholder who brings a bill in the nature of interpleader asserts a claim to the fund that is adverse to that of the defendant claimants." (Pet. App. at 10a-11a)

24. As Professor Wright explains:

> [O]nce an interested stakeholder deposits the fund with the court or posts an appropriate bond, he does become a claimant for all practical purposes and his citizenship should be relevant in deciding the jurisdiction question. Moreover, since by hypothesis, the stakeholder's citizenship will be diverse from that of at least one of the claimants, the interpleader has interstate aspects and therefore seems to fall within the class of cases intended to be covered by the statute. (14 WRIGHT, § 3636 at 73 (1976))

What has been suggested to be a contrary view appears at 3A MOORE'S FEDERAL PRACTICE, § 22.09[1] (1979). An examination of this discussion of the subject, however, reveals that this treatise is providing an historical review of the earlier lower court cases which, in order to sustain jurisdiction, held an interested stakeholder's citizenship irrelevant under statutory interpleader.

They predict that unless this finding is overturned, "nearly every bilateral dispute could be framed to invoke federal jurisdiction. . . ." (Pet. Br. at 30). Federal statutory interpleader, however, is intended to prevent multiple payments to multiple claimants where there is only a single liability, and no state court can obtain jurisdiction over all the parties. Therefore, where a plaintiff [from State A] is holding a "sum of money which is claimed by X [from State B] and X alone" (Pet. Br. at 30), the stakeholder faces a single and not multiple liability. Unless and until the stakeholder is subjected to the threat of vexatious litigation and multiple liability, interpleader is both unavailable and unnecessary. *See, e.g. Holcomb v. Aetna Life Ins. Co.*, 228 F.2d 75 (10th Cir. 1955), *cert. denied*, 350 U.S. 986 (1956); *Austin v. Texas-Ohio Gas Co.*, 218 F.2d 739 (5th Cir. 1955); *Pan Am. Fire & Cas. Co. v. Revere, supra.*

Similarly, the prediction that undesirable effects will follow from allowing a section 1335 stakeholder-claimant to bring the action in his own district under 28 U.S.C. § 1397 also has a hollow ring. This option is already available to the stakeholder who brings a Rule 22 interpleader based on diversity of citizenship, the most common basis for rule interpleader actions. *See State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. at 528, n. 3; 7 WRIGHT, § 1712 at 425; 28 U.S.C. § 1391(a). Moreover, if the forum chosen by the stakeholder, under statutory or rule interpleader, is truly inappropriate, then defendants in both instances may seek a change of venue under 28 U.S.C. § 1404(a).

These same assertions were vigorously urged by Cory and Alvord in the Court of Appeals. That court was

therefore well aware of these arguments but properly rejected them, relying on the better-reasoned approach:

> The declining importance of the classic limitations on interpleader and the acceptance of jurisdiction based on minimal diversity under the statute are evidence of a trend toward the broadest availability of interpleader relief that has been underway since the adoption of the federal rules. Allowing statutory interpleader [when the defendant claimants are citizens of the same state, but an interested stakeholder is diverse,] would be consistent with that trend. (7 WRIGHT § 1710 at 406 (footnote omitted)) (Pet. App. at 11a, n. 12)

The diversity finding by the Court of Appeals, therefore, as to stakeholder-claimant Lummis is neither unfounded nor fraught with insurmountable problems for the federal judiciary. The Court of Appeals properly considered the citizenships of Lummis and Alvord in holding that the adversity and diversity prerequisites of the interpleader statute are met in this action.

Moreover, even assuming *arguendo*, that the concerns raised by Cory and Alvord of looking to the interested stakeholder's citizenship (Lummis, as Texas Administrator) for diversity purposes are valid, these objections are not applicable to the citizenship of Lummis and First National Bank of Nevada (as Nevada Administrators) because the latter are not stakeholder-claimants. They are not stakeholders because they hold none of the intangible assets which comprise the interpleader fund in this action (Lummis, Test., A. 119). They are, however, adverse to the claims of Cory and Alvord and White and

Bullock, because they claim that Mr. Hughes died domiciled in Nevada and that they, as domiciliary administrators, are entitled to custody and possession of all intangible assets of the Estate undiminished by payment of any state death taxes (A. 99). Any criticism of looking to the interested stakeholder's citizenship for diversity purposes does not, however, apply to the Nevada Administrators, and they, as adverse and diverse claimants, provide yet another basis for sustaining interpleader jurisdiction.

2. The Diversity Finding As To Alvord Is Unaffected By The Recent Change In California Law.

When this action was commenced, California law provided that inheritance taxes were collected by the county treasurer of the county where a decedent was domiciled at death. CAL. REV. & TAX. CODE §§ 14104, 14791, 14793-95. The county treasurer would retain a percentage as a "commission" and would remit the remainder to the state controller. Because this statutory scheme made County Treasurer Alvord a claimant against the intangible assets of the Estate, Lummis named him as a defendant. The district court conceded and the Court of Appeals squarely held that Alvord's citizenship could be considered for diversity purposes, under *Moor v. County of Alameda*, 411 U.S. 963 (1973), *overruled on other grounds, Monell v. Dept. of Social Services*, 436 U.S. 658 (1978).

Cory and Alvord now claim that a revision in California law, some two and a half years after the suit

was commenced,[25] undoes the diversity finding of the Court of Appeals as to Alvord. However, it has long been held in diversity cases that "jurisdiction of the court depends on the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events." *Mollan v. Torrance*, 22 U.S. (9 Wheat) 537, 539 (1824) (Marshall, J.). Therefore, the fact that the California legislature may have modified the inheritance tax law has no effect on jurisdiction in this case.[26]

Cory and Alvord, seeking to avoid this doctrine, rely on cases involving either (1) the joinder of additional parties, as plaintiffs or defendants, whose presence will destroy diversity (Pet. Br. at 33, n. 41-42); or (2) the dismissal of non-diverse parties, plaintiffs or defendants, whose presence will destroy diversity (*Id.* at 34, n. 43-44); or (3) intervention by parties, indispensable or non-indispensable, again whose presence also destroys diversity (*Id.* at 34, n. 46). This authority is plainly inapposite because here there has been no attempt to join

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25. Lummis filed this interpleader suit in July, 1978. The legislative change was signed into law on July 1, 1980, some three months before the Court of Appeals handed down its judgment. The revision became effective, for "all estates, on January 1, 1981." It was not until January 16, 1981 that Cory and Alvord brought this change to the attention of the Court of Appeals in their motion for rehearing out of time. This was some two weeks after the court had granted Cory and Alvord's request for a stay of its mandate on the basis that they would file a Petition for Certiorari in this Court.

26. Whatever the motive for the change in the California tax law, the change raises the troublesome problem that, if the general rule is ignored or did not exist, state legislatures could exempt officials from suit in federal court by eradicating or otherwise altering the officials' duties after commencement of an action.

or dismiss or refuse intervention to a party because their presence will destroy diversity.

More fundamentally, their cases are inapplicable because they deal with the application of Rule 19, FED. R. CIV. P. principles to non-diverse parties. As these cases point out, if a non-diverse party is indispensable, the action must be dismissed. On the other hand, if the non-diverse party is found not to be indispensable, that party will be dismissed in order to preserve jurisdiction. In effect, the posture of a case *after* all indispensable parties have been joined, or non-indispensable parties dismissed, is the critical time as far as a determination of diversity jurisdiction is concerned, *because this is the first time at which the case has been structured as it should have been at the time of commencement.*

The statutory change reflects a legislative assignment of Alvord's claim to Cory who now collects the inheritance tax. This change, however, has not altered the nature of this action in any way and therefore does not divest the court of its jurisdiction. *See* 13 WRIGHT, § 3608, at 656 (1975). The underlying bases of Alvord's claim and Cory's claim are the same—that Mr. Hughes died domiciled in California. Controller Cory, of course, continues to assert this claim as before.[27]

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27. Unlike the situation in *Kennametal, Inc. v. International Union*, 161 F. Supp. 362 (W.D. Pa. 1958), cited by Cory and Alvord, no claim against the fund has been abandoned. This is underscored by the fact that Cory and Alvord do not now contend that the amount they seek to assess against the Estate has been reduced because of the change in law. If Mr. Hughes were eventually adjudged to have died a domiciliary of California, the amount of tax due Alvord (24%) would now be transmitted to his transferee, Cory.

The change in California law merely effected a transfer of interest from Alvord to Cory, a transfer which may be compared to situations where a diverse party's interest shifts to a non-diverse party without affecting diversity jurisdiction. *See Fred Harvey, Inc. v. Mooney*, 526 F.2d 608 (7th Cir. 1975); *accord, Hardenbergh v. Ray*, 151 U.S. 112, 118 (1894). In *Television Reception Corp. v. Dunbar*, 426 F.2d 174 (6th Cir. 1970), the original diverse party assigned his interest to a non-diverse corporation. In finding that the assignment had not destroyed diversity jurisdiction, the court reiterated the general rule that

> federal jurisdiction is tested according to the facts as they exist at the time an action is initiated, and that diversity jurisdiction, once acquired, is not defeated by events occurring subsequent to the commencement of the action. (Citations omitted.) (*Id.* at 177)

See also Gaines v. Dixie Carriers, Inc., 434 F.2d 52 (5th Cir. 1970).

The rule represents a sound policy, one which "provides maximum stability and certainty to the viability of the action and minimizes repeated challenges to the court's subject matter jurisdiction." 13 WRIGHT, § 3608, at 656 (1975). There was no need for the Court of Appeals to reconsider the issue of interpleader jurisdiction. Because diversity jurisdiction was unaffected by the change in California law, Cory and Alvord's petition for rehearing out of time was properly denied.

V. THE FEDERAL DISTRICT COURT, IN THIS INTERPLEADER ACTION, CAN PROVIDE A FAIR AND IMPARTIAL FORUM.

Cory and Alvord assert that the twenty-two signatories to an intrafamily settlement agreement should be joined in this action as necessary parties under Rule 19, FED. R. CIV. P.[28] Lummis asserts that under Rule 17(a), FED. R. CIV. P., the joinder of the heirs is not required and that no good purpose will be served by the addition of twenty-two unnecessary parties. Rule 17(a) provides in pertinent part: "Every action shall be prosecuted in the name of a real party in interest. An executor, administrator . . . may sue in his own name without joining with him the party for whose benefit the action is brought. . . ." This rule is an expression of the substantive law that it is the right and duty of the administrator to enforce the rights of the estate because he is the "real party in interest." 3A MOORE'S FEDERAL PRACTICE § 17.12 (1978); 6 WRIGHT § 1543, 1548 (1971). Both the District Court and the Court of Appeals properly concluded that Rule 17 was dispositive of this issue (Pet. App. at 2e, 12a). However, if this Court were to determine that the heirs should be joined as parties, transfer of this action is nevertheless unwarranted.

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28. The twenty-two persons Cory and Alvord sought to join in this action have now been determined by the Texas probate court to be the heirs-at-law of Mr. Hughes under Texas intestate succession law. Appeals have been taken from this determination by various persons claiming to be heirs. In a separate phase of the Texas probate proceeding, the court has entered judgment against a foundation claiming rights in the Estate under a so-called "lost will." An appeal from this judgment has also been taken. Heirship proceedings are pending in the other Estate administrations.

Lummis properly brought this action in the Western District of Texas where claimants White and Bullock reside. *See* 28 U.S.C. § 1397. Cory and Alvord have sought, since the outset of this action, to elevate what is properly a discretionary question of venue under 28 U.S.C. § 1404(a) to the status of a jurisdictional component of 28 U.S.C. § 1335. This is so even though there has been only speculation, and no showing on their part, that the federal district court in Austin, Texas is not a fair and impartial forum.

They assert that this action would have an adverse impact on state sovereignty because it would be inappropriate to require them to litigate their "tax claim" in a federal district court "sitting in Texas." The district court in Austin, although "sitting in Texas," is nonetheless a federal court. The neutrality that Cory and Alvord seek can be achieved in the present forum, for "the very purpose of federal diversity jurisdiction is [to] avoid bias against parties from outside the forum state." *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 716, n. 6 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975). *Accord*, *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 111 (1945).[29]

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29. Cory and Alvord assume, but again do not establish, that the issue of domicile is triable by a jury and that such a jury, although under the control of a federal judge, would act unfairly. This assertion overlooks the safeguards which the federal court system affords litigants in jury cases. These include the requirement of unanimity of verdict, the power and duty of federal judges to instruct the jury orally and to comment on the evidence, the ability of federal judges to act as authoritative participants in the trial rather than as mere umpires, and the power of federal judges to appoint a master to make findings which could be admitted as evidence to the jury under Rule 53(e)(3), FED. R. CIV. P. *See generally*, SEN. REP. NO. 1830, 85th CONG. 2d SESS., *reprinted in* [1958] CODE CONG. & AD. NEWS 3099, 3118.

Cory and Alvord's motion to change venue rests on unfounded assumptions. The pecuniary interest that is said to disqualify Austin residents as jurors in this case rests on the tenuous claim that each citizen of Texas will individually benefit in the sum of $6.02 if Texas is ultimately determined to be the domicile of Mr. Hughes. However, even the cases cited by Cory and Alvord illustrate that in order for a pecuniary interest in the outcome of the litigation to disqualify a factfinder, the interest must be *direct* and *substantial.*[30] On the other hand, where the factfinder's pecuniary interest is, at best, indirect and speculative, the Court has held that it has no effect on the impartiality of the factfinder. For example, in *Dugan v. Ohio*, 277 U.S. 61 (1928), fines from convicted defendants were paid into a general fund from which the mayor's salary was paid. This statutory scheme did not create a sufficient economic incentive so as to disqualify the mayor from presiding as judge in criminal proceedings. The personal financial benefit, if any, that will accrue to the citizens of Texas if Mr. Hughes is found to be a Texas domiciliary is similarly indirect, remote, and insignificant.

Mere state pride is hardly a sufficient basis for disqualification of a forum's jurors. As the court in *United States v. Haldeman*, 559 F.2d 31, 135-36 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 933 (1977), noted:

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30. For example, in *Tumey v. Ohio*, 273 U.S. 510 (1927), the judge received a fee for each defendant convicted; in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), the mayor also served as village judge and fines levied by him constituted "a major part of village income"; and in *Connally v. Georgia*, 429 U.S. 245 (1977), a justice of the peace received a fee *each time* a search warrant was issued. This Court properly found the *Tumey*, *Ward*, and *Connally* arrangements to be a denial of due process.

> A fundamental premise of our jurisprudential system is that, save in the most extraordinary circumstances, an impartial jury expectably may be convened anywhere in the Nation. Another is that the capability of doing so is always to be presumed until the contrary appears.

Evaluation of possible local bias and prejudice, resulting from the publicity generated *some three years ago* by the Houston domicile trial, is also premature at this time. In *United States v. Haldeman, supra,* a case which generated even greater publicity, the court noted that a pre-*voir dire* determination of the effect of pretrial publicity is, of necessity, subjective in nature:

> A judge reviewing pretrial publicity before the *voir dire* would have to attempt to determine from his own reactions how the community would respond to that publicity. . . . After the *voir dire* a judge can determine which [side's] description of the publicity's impact is accurate; before the *voir dire* a judge can only have guessed. (559 F.2d at 62, n. 37)[31]

Any objective evaluation in this case of the effect of pretrial publicity, regional pride, and pecuniary interest, all of which are subjective factors, must therefore await *voir dire. See United States v. Davis,* 583 F.2d 190 (5th Cir. 1978); *Jones v. Gasch,* 404 F.2d 1231 (D.C. Cir. 1967), *cert. denied,* 390 U.S. 1029 (1968).

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31. The *Haldeman* court, after reviewing the *voir dire,* noted with regard to the impact of the pretrial publicity, "Most of the venire simply did not pay an inordinate amount of attention to Watergate. This may come as a surprise to lawyers and judges, but it is simply a fact of life that matters which interest them may be less fascinating to the public generally." (*Id.* at 62, n. 37)

Further, it should be remembered that Lummis, who is asserting Nevada domicile, will be no less interested than Cory and Alvord in having this case heard and decided by an impartial jury. Contrary to the assertion by Cory and Alvord (Pet. Br. at 10, n. 10), the Estate has a substantial interest in prevailing in its claim of Nevada domicile. From a pecuniary standpoint, the tax liability of the Estate will be appreciably higher if Texas is determined to be the state of domicile than if Nevada is so determined, because the Texas valuation of the intangible assets is greater than that of the federal government. Moreover, Lummis in his duty as administrator has the obligation to urge as the domiciliary state the one that is indicated by his extensive factual investigation.[32]

Changing the venue of this action to Colorado would be a departure from the traditional interpretation of the venue statute that a forum should have sufficient contacts with the litigation to warrant its being litigated in that forum. *See generally Gulf Oil Co. v. Gilbert*, 330 U.S. 501 (1947). Other than having an heir in residence, the District of Colorado has no connection with this litigation. By contrast, Cory and Alvord could have moved (and could still move, upon a proper showing) for a transfer to the District of Nevada, the residence of claimant

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32. In an apparent inconsistency, Cory and Alvord assert that Lummis limited the parties in this action to "citizens of the competing states" (*presumably Cory and Alvord and White and Bullock; see* Section IV, A, *supra*) in order to "foreclose transfer to a disinterested forum" (Pet. Br. at 11, n. 11). The lack of substance to their assertion is even more evident when viewed against the attempt by Cory and Alvord to seek transfer to an alternative forum, the Central District of California (an attempt which they now understandably minimize.)

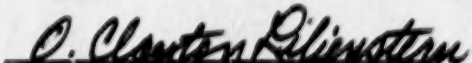
Lummis, a proper transferee forum under 28 U.S.C. §§ 1397 and 1404(a). Nevada not only has a substantial connection with this litigation, but as a state with no death tax, would surely satisfy even Cory and Alvord's notion of an impartial forum.

CONCLUSION

The Court of Appeals properly held that "the federal system that has spawned Lummis' dilemma of double taxation provides him with a remedy." (Pet. App. at 12a) The basic question presented in this action is whether the district court may proceed to determine the merits as to the domicile of Mr. Hughes at death and render an adjudication binding the tax officials and the Estate Administrators so that the Estate may discharge its tax liability once and not multiple times. Simple justice answers affirmatively and Federalism concurs. Federal interpleader furnishes the mechanism.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,



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